BRIEF FOR THE RESPONDENT

IN THE

Supreme Court of the United States

October Term, 1944

No. 914

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION,
Petitioner

v.

SEMINOLE ROCK & SAND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

ROBERT RUARK, Raleigh, N. C.
BENNETT H. PERRY, Henderson, N. C.
ROBERT H. ANDERSON, Miami, Florida.
J. M. HEMPHILL, Chester, S. C.
SAMUEL W. RUARK, Raleigh, N. C.
Attorneys for Respondent.

INDEX

SUMMARY OF ARGUMENT

CITATIONS

Cases:

No. 914

IN THE

Supreme Court of the United States

October Term, 1944

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION,

Petitioner

v.

SEMINOLE ROCK & SAND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court appears in the original record (R. pp. 181-187) though unreported in Federal Supplement. The opinion of the Circuit Court of Appeals (R. pp. 191-196) reported in 145 F. 2d, 482.

QUESTION PRESENTED

The question presented is whether the ceiling price of Respondent under the statute and regulations was the prevailing current price charged by the Respondent for delivery during the month of March, 1942, or was it the highest price at which Respondent made actual physical delivery in March, 1942, under a pre-existing contract entered into in October, 1941?

STATUTE, REGULATIONS, AND INTERPRETATIONS INVOLVED

The statute and regulations involved are those set forth in the petition of the Administrator and to which should be added the following:

Amendments to Maximum Price Regulation No. 188, particularly Amendment No. 3, issued December 4, 1942 (O.P.A. Document No. 7928), the pertinent portions of which are as follows:

> "(iii) * * *
>
> "Provided, however, That
>
> "(a) If before April 1, 1942, the seller raised his prices for a commodity to all his classes of purchasers (or to all his classes of purchasers except those to which he was bound to make delivery during March, 1942, under a firm commitment made before the price rise), and
>
> "(b) If during March, 1942, he delivered the commodity at the increased price to at least one class of purchasers, then, in order to allow the seller to apply the price rise to any class of purchasers to which no delivery was made during that month after the price rise (except under a firm commitment made before the price rise), the highest price charged during March, 1942, shall be deemed to be":

Press Release (O.P.A. No. 1223), dated December 5, 1942, for release to Saturday morning papers, December 5, 1942.

The pertinent language of this release is as follows:

> "The effect is to allow one, who last March delivered at prices established by a contract signed many months before and who raised his prices generally before April 1, to bring his prices on the expiration of the contract in line with the increased prices he was charging in March. March is the base period under the two regulations."

O.P.A. Document 564, being a Press Release for immediate release Thursday, August 20, 1942, the pertinent language of which is as follows:

> "A more direct method for sellers subject to the General Maximum Price Regulation to establish ceiling prices for classes of purchasers with which they did not deal in March was established today by the Office of Price Administration.
>
> "At the same time O.P.A. *broadened* the conditions under which a seller may put in effect price increases announced during or prior to March, 1942, in cases where the seller did not make deliveries during March to all classes of purchasers at the higher prices.
>
> "As amended, the Regulation permits a seller, who, during or prior to March, increased prices to all classes of purchasers of a commodity or service to make the increased prices his ceilings for each class of purchasers as long as he made delivery during March at the higher prices to any one of his classes of purchasers. However, if, after the general price increase the seller delivered to a class of purchasers only at a lower price, the lower price is the maximum price *unless the delivery was made under a contract.*" (Emphasis supplied.)

U.S.C.A. Title 50, App. paragraph 942, (a) and (b), reading as follows:

> "Parag. 942. DEFINITIONS
>
> "As used in this Act—
>
> "(a) The term 'sale' includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms 'sell,' 'selling,' 'seller,' 'buy,' and 'buyer,' shall be construed accordingly.
>
> "(b) The term 'price' means the consideration demanded or received in connection with the sale of a commodity."

Amendment No. 38 to General Maximum Price Regulation, effective date December 10, 1942, issued December 5,

1942, O.P.A. Document No. 7926 (incorporated by reference into MPR 188). The pertinent provisions are provisions (1) and (2) and they are identical with Amendment No. 3 to Maximum Price Regulation 188, quoted above except that the amendment in the General Maximum Price Regulation incorporates services in addition to commodities as controlled by the Maximum Price Regulation.

General Maximum Price Regulation No. 1499.20, Subdivisions (h) and (p) and (r), the pertinent parts of which are as follows:

> "(h) 'Offering price' means the price quoted in the seller's price list, or, if he had no such price list, the price which he regularly quoted in any other manner * * *."
>
> "(p) 'Sale at wholesale' means a sale by a person who *buys* a commodity and resells it, without substantially changing its form, to any person other t an the ultimate consumer * * *" (Emphasis supplied.)

This change of language to read as above was made to the original regulation by Amendment No. . of June 19, 1942; the word "buys" formerly read "receives delivery."

> "(r) 'Sell' includes sell, supply, dispose, barter, exchange, lease, transfer, and deliver, and contracts and *offers to do* any of the foregoing. The terms 'sale,' 'selling,' 'sold,' 'seller,' 'buy,' 'purchase,' and 'purchaser,' shall be construed accordingly." (Emphasis supplied.)

STATEMENT OF FACTS

Respondent is a producer of crushed stone, a commodity subject to Maximum Price Regulation No. 188 and the amendment thereto. During the month of October, 1941, or just prior thereto, Respondent entered into a contract with the Seaboard Air Line Railway Company whereby it agreed to furnish the latter, on demand, crushed stone at

a price of sixty cents (60c) per ton, to be delivered when called for by the purchaser. In the latter part of January, 1942, Respondent verbally made a firm commitment to sell and deliver, on demand, to V. P. Loftis Company crushed stone at One Dollar and Fifty Cents ($1.50) per cu. yd. The stone sold to Seaboard and the stone sold to Loftis was found first by the District Court, then by the Circuit Court of Appeals, to be substantially the same commodity or material (R. pp. 181-186 and p. 193). Indeed, the deliveries made to both Seaboard and Loftis were filled from the same piles of stone (R. 193). The orders of both purchasers were filled from the same stockpiles interchangeably. (R. p. 33.)

The contract with Loftis was confirmed in writing on February 11, 1942 (Exhibit A, R. p. 21.) On January 15, 1942, there was an actual physical delivery to Loftis of a portion of the crushed stone Respondent had committed itself to deliver on demand. Respondent proceeded in good faith to crush and stockpile the stone it had contracted to deliver to Loftis on demand and as the stone was crushed and stockpiled it was inspected and accepted by a Government inspector from the U. S. Engineers Office (R. pp. 80-81) as being the product the Respondent was committed to deliver to Loftis. On March 12, 1942 (R. p. 22) Loftis wired Respondent:

> "Operations on our Stuart contract to continue. Stop. Continue shipments on our order."

On account of having to work on the coffer-dam for approximately 30 days, Loftis could not pour concrete and did not have available storage space for crushed stone; for these reasons, he was unable to accept actual delivery of any more stone from the Respondent until after March, 1942, when Loftis could begin pouring concrete. (Exhibit D, R. p. 22.)

Solely by reason of the fact that Respondent had been advised by Loftis not to make further actual deliveries during March, 1942, the only actual deliveries made during the month of March of the same commodity was to Seaboard for the purpose of partial completion of the pre-existing contract entered into in October, 1941.

The Courts below found upon substantial evidence that Loftis and Seaboard were purchasers of the same class.

Under the contract with Loftis there were two classes of stone (Exhibit A), (R. p. 20); Class A stone and Class B stone, the two classes differing only as to size and having the same market price of One Dollar and Fifty Cents ($1.50) per cu. yd. (There is no appreciable difference between a cubic yard of crushed stone and a ton of the same material, as stated by the Circuit Court.) (R. p. 193.) The Class B stone, under the Loftis contract, was the same commodity sold to the Seaboard and was used interchangeably. (R. p. 84.)

By another contract, between October 8, 1942, and December 15, 1942, Respondent sold and thereafter delivered to Seaboard 25,239.25 tons of crushed stone at Eighty-five Cents (85c) per ton and by another contract commencing on or about December 15, 1942, sold and thereafter delivered to the Seaboard 92,316.15 tons of crushed stone at One Dollar ($1.00) per ton. These two last mentioned contracts and deliveries to the Seaboard are the basis of the claim of the Administrator insofar as his action is for treble damages, and likewise the basis on which he sought his injunction.

Between October, 1941, when Respondent contracted with Seaboard to deliver crushed stone at Sixty Cents (60c) per ton, and September 1, 1942, the cost of producing this stone had increased Thirty-eight Cents (38c) per ton. (R. pp. 76-77.)

The District Court dismissed the action on the grounds (1) that whatever cause of action existed to recover a judgment under Section 205(e) of the Act was vested in the purchaser and not in the Administrator, and (2) that One Dollar and Fifty Cents ($1.50) per ton was the highest price "charged for delivery" of this commodity in March, 1942, thereby becoming the ceiling price on this commodity, and that the price of Sixty Cents (60c) per ton for the same commodity delivered to the Seaboard in March, 1942, under a pre-existing contract was not the maximum price at which Respondent could lawfully sell that commodity, as contended by the Administrator.

The Price Administrator appealed. The Circuit Court of Appeals disagreed with the District Court with respect to who had the right to maintain the action, holding that the Administrator and not the buyer had such right, but affirmed the District Court in its holding that One Dollar and Fifty Cents ($1.50) per ton was Respondent's ceiling price for the commodity involved, as shown by the proper interpretation of the statute and pertinent regulations.

The case is now before this Court on a writ of certiorari.

ARGUMENT

The District Court and the Circuit Court below have found the facts in this case. Unless such facts are clearly erroneous, the findings will not be disturbed on review.

Rule 52, U. S. C. A., Title 28, page 677.

The Plain intendment of the Statutes and Regulations is to fix as the maximum price the price for which an article of commerce was bought andd sold in legitimate trading in the due course of business during March, 1942.

The Administrator contends that the maximum price is fixed only by actual deliveries made during March, 1942.

In so doing, he ignores all requirements of the Regulation and gives force and effect only to the word "delivered."

Section 1499, 153(a) reads as follows:

> *"Articles Priced in March, 1942.* The maximum price for an article which was delivered *or offered for delivery* in March, 1942, by the manufacturer shall be the highest price charged by the manufacturer during March, 1942 (as defined in Section 1499,163), for the article." (Emphasis supplied.)

Section 1499.163(a) (2) reads as follows:

> "1. The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942; or
>
> "2. If the seller made no such delivery during March, 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or the material during that month."

Obviously, there must be *both a charge and a delivery* during March, 1942, to fix a ceiling price. If, however, there was not *both a charge and a delivery*, the maximum price would be the highest offering price.

It is clear that the Regulation, when it says "If no charge was made for the same commodity," means that if no such charge was made in March, 1942. On the contrary, such charge as was made for the material sold by the Respondent was made when it entered into its contract with *Seaboard Air Line Railway* in October of 1941. Obviously, as to that contract, there was no *charge* or *sale* in March, 1942, and under the Regulation properly construed or interpreted *both* a *sale* and a *delivery* in March, 1942, are essential to the fixing of a ceiling price.

In the case of *Brown v. Mars*, 135 F. 2d, 843, on page 856, in the opinion of the Circuit Court of Appeals for the 8th Circuit, it is said:

> "The Regulation establishing the March base prescribed the highest price *charged* by the seller during

> March, 1942," to apply to commodities "delivered * * * during March, 1942." Delivered during March, 1942, was defined as being if during such month it was received by the purchaser or by any carrier * * * for shipment to the purchaser." General Maximum Price Regulation, Section 20(d). Thus, the test is a *sale and delivery* to the purchaser or to a carrier for him during March." (Emphasis supplied.)

Petitioner devotes a considerable portion of his Brief to the proposition that the method of pricing was to freeze all prices at the level of the highest prices charged by each seller in March, 1942. The emphasis placed upon the Regulation throughout should be upon the word "charged," whereas the Administrator seeks to place it upon the word "delivered." In spite of the words "charged for delivery" which appear repeatedly in the Regulation and the subdivisions thereof, the Administrator apparently seeks to substitute for these words in his own Regulation the words "charged for a product which was delivered" regardless of the time when the sale was made. Carried to its logical conclusion, the contention of the Administrator would defeat his oft-declared purpose to fix prices as of March, 1942.

The placing of so much emphasis upon the word "delivered" and ignoring the phrase "highest price charged during March, 1942," leads the Administrator to an illogical construction of the Regulation. In fact, the clause, "highest price charged during March, 1942," loses its meaning entirely if it is to be read out of the Regulation. The Administrator himself has always contended that the core of the Regulation is its requirement that each seller charge no more than the prices which were charged during March, 1942.

The deliveries made by Respondent which were made during March, 1942, for which it received a lower price than its highest offering price as found by the District Court

and the Circuit Court of Appeals below, were made pursuant to a contract made in October, 1941. This contract called for delivery over a period of months including March, 1942. The transactions or actual sales took place in October, 1941, and are therefore to be disregarded.

The only reasonable construction which can be given to the Regulation is that *both* the charge and the delivery must have occurred during March, 1942, in order to fix the maximum prices. It follows that *both* a sale and a delivery pursuant thereto must have occurred during March, 1942. Any other construction renders meaningless the clause "highest price charged during March, 1942."

In this connection sight should not be lost of the definition contained in Section 302 of the Emergency Price Control Act of 1942 (U.S.C.A. Title 50, APP 942), reading as follows:

> "(a) The term 'sale' includes sales, dispositions, exchanges, leases and other transfers, and contracts or offers to do any of the foregoing. The term 'sell,' 'selling,' 'seller,' 'buy,' and 'buyer' shall be construed accordingly."

To substantially the same effect is the promulgation of the Administrator himself. (See quotation from 1499.20 (r) *supra.*)

It will thus be seen that *both* Congress and the Administrator placed *sales* and *offers for sale* on the *same* basis and in neither of the definitions was a delivery required or, for that matter, even mentioned.

Since, according to the record, Respondent made no deliveries during March, 1942, other than deliveries made to the Seaboard Air Line Railway Company under the pre-existing contract of October, 1941, it follows that the ceiling price of the Respondent became its highest offering price for delivery of the same product. This the Courts below arrived at by taking the price which was the Respon-

dent's highest current offering price prevailing during March, 1942, because of the fact that the Respondent had made a firm commitment to deliver at the price during March, had on hand the product for delivery which it had constructively delivered by its having been inspected, passed and actually ordered to be delivered when circumstances beyond Respondent's control prevented actual physical delivery during the base period. The Courts below properly held that such circumstances preventing actual delivery should not be allowed to affect Respondent's ceiling price and interpreted the Act and the Regulation accordingly. Not only is this true in the case at bar but the Emergency Court of Appeals, considering the validity of a similar regulation, has said that such fortuitous circumstances should not affect the rights of the parties.

In the case of *Montgomery Ward & Co., Inc. v. Chester Bowles, Price Administrator,* decided February 12, 1945, and unpublished, Judge Laws, speaking for the Emergency Court of Appeals in declaring a Regulation of the Administrator invalid, has the following to say:

> "The discrimination is obvious and was brought about not by reason of any scientific approach to price control but by what may have been a turn of the wheel of chance. Failure of a merchant to deliver in March, 1942, from his highest price line might have occurred because of weather conditions in his location; because the style of garments which he handled in his highest price line during that month chanced not to meet with favor; because he was temporarily out of stock in his highest price line; because of inadequate advertisement or displays; or any number of other misfortunes. We may not assume that failure to make a delivery in a price line for such reasons would, in the normal course of events, result in his abandonment of the price line; certainly in many cases it would not. Nevertheless, the Regulation forced such bandonment, while at the same time more fortunate merchants in the nation suffered

> no such results in the conduct of their businesses. * * * For these reasons, we think Maximum Price Regulation No. 330, before the issuance of Supplementary Order No. 93, was invalid in its application to merchants who, because of their failure to make a delivery of garments during March, 1942, were denied the right to make future sales of garments in a category in price lines which they were actually engaged in selling during March, 1942, or in price lines below the highest price lines which they were actually engaged in selling in that category during March, 1942."

It is apparent from the record in this case (R. p. 42) that the actual production cost to Respondent of material, the sale of which was complained of in the case at bar, was 92c per ton. Therefore, the construction of this Regulation contended for by the Administrator would effectively stop any sales of this product by the Respondent. The Courts below, seeing the inequity and unfairness of this situation, interpreted the Regulation so as to give effect to the meaning of the Act, as they had a right to do and as it was their duty to do.

Stewart v. Kahn, 11 Wall. 493, 20 L. Ed. 176.

In the case at bar the Courts below recognized the validity of the Regulation and construed and applied its provisions in a manner consistent with its validity. (R. p. 194.)

Yakus v. United States, 321 U. S. 414.

As the Circuit Court of Appeals, in its opinion below, said:

> "Moreover, since this Court has no jurisdiction to consider the validity or invalidity of these particular regulations, we must accept and apply them in a manner consistent with their validity."

Bowles v. Seminole Rock & Sand Co., 145 F. 2d. 482

Proper construction of statutes involves conclusions which lie beyond the direct expression of the text.

United States v. Farenholt, 206 U. S. 226, 51 L. Ed. 1036.

"Statutes should receive a sensible construction such as will effectuate the legislative intention and, if possible, so as to avoid an unjust and absurd conclusion."

In re: Chapman, 166 U. S. 661.41 L. Ed. 1154.

"General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. *It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.*" (Emphasis supplied.)

United States v. Kirby, 7 Wall. 482, 19 L. Ed. 278.

The price found by the Courts below to be the ceiling price was fixed upon the basis of Respondent's highest offering price in March, 1942, and is buttressed by the fact that it was the *prevailing* price during the base period in Dade County, Florida, in which Respondent's business was located. (R. p. 38.)

In the case at bar the Court of Appeals has the following to say, citing *Yakus v. U. S.*:

"The *plain intendment* of the statutes and regulations by means of which prices were frozen was to fix those prices indiscriminately at the highest price for which an article of commerce was *bought and sold* in legitimate trading in the due course of business during March, 1942. *The Act requires that the 'prices established must be fair and equitable and in fixing them the Administrator is directed to give due consideration so far as practicable to prevailing prices during the designated base period.'*" (Emphasis supplied.)

Yakus v. United States (*Supra*).

Not only has the Circuit Court in the case at bar concluded that a delivery made under a pre-existing contract is not the controlling factor in fixing the ceiling price but precisely the same conclusion was reached in the case of *Bowles v. Good Luck Glove Company*, 52 Fed. Supplement 942 (D. C. Illinois). Actually the Circuit Court of the 7th Circuit has not finally acted upon the judgment of the District Court in the *Good Luck Glove Company case*, as appears in the Petitioner's application for writ of certiorari, but the Circuit Court of Appeads of the 7th Circuit did say that the District Court had filed an opinion with which the Circuit Court was in accord and Petitioner has treated the language of the Circuit Court in its opinion as the decision of that Court.

Bowles v. Good Luck Glove Co., 143 Fed. 2d, 579.

Considering the opinion by the Circuit Court of Appeals as a final adjudication on the merits of the issues involved, it is apparent that the decision in the *Good Luck Glove case* and the case at bar agree entirely to the effect that a delivery under a pre-existing contract is not controlling. In the *Good Luck Glove Company case* it was the contention of the Administrator, as it is here, that ceiling prices for the specific commodity had been fixed by reason of actual deliveries made during March, 1942, which were made in partial compliance with a pre-existing contract. The Court held that the prices upon which the Company had become committed some months before were *not* the maximum prices because such prices were *not* the current *prevailing* prices during the base period of March, 1942, and that it was not the intention of the Congress and the Administrator to fix the ceiling as of March, 1942, at the price fixed by outstanding contracts ante-dating March, 1942, by several months. The Court in the case at bar arrived at precisely the same conclusion.

The Courts below properly considered rules of construction for the statutes and gave to the statute and to the Regulation its real meaning with a view towards accomplishing the purpose of the Act and properly concluded upon ample evidence that the established ceiling price was One Dollar and Fifty Cents ($1.50) per ton.

The interpretations which the Administrator contends were given to the Act are neither binding upon Defendant nor conclusive upon the Court.

In *Davies Warehouse Company v. Bowles, Price Administrator*, 321 U. S. 144, 64 Sup. Ct. Rep. 474, the proceeding was to set aside a supplementary regulation and amendment to the General Maximum Price Regulation. On the question here under discussion, the Supreme Court says:

> "Lastly, it is contended that we should accept the Administrator's view in deference to Administrator's construction. The Administrator's ruling in this case was no sooner made than challenged. We cannot be certain how far it was determined by the considerations advanced, mistakenly as we think, in its defense in this case. It has hardly seasoned or broadened into a settled administrative practice. If Congress had deemed it necessary or even appropriate that the Administrator's order should in effect be final in construing the scope of the national price-fixing policy, it would have not been at a loss for words to say so. We do not think it should overweigh the considerations we have set forth as to the proper construction of the statutes."

In *Walling v. Swift & Co.*, 131 Fed. (2d), 249 (7th Circuit), the Court said, at page 252:

> "We have given consideration to the fact that this is an administrative interpretation of the Act promulgated by the Department, but we do not think it has determinative influence. It must be remembered that this interpretation of the Department is new and af-

fords the very basis of this controversy, in the making of which the Defendant has challenged this ruling at its first opportunity. In our opinion, for such a ruling to prove persuasive, it should have been settled and acted upon by the Department and acquiesced in by those affected thereby for such time as would lead one to believe that because of the acceptance of this interpretation it had gained some sanction."

"See also to the same effect: *W. P. Brown & Son Lumber Co. v. L. & N. Railroad Co.*, 299 U. S. 393, 57 Sup. Ct. Rep. 265; *Ft. Worth & Denver City Railway Co. v. Childress Cotton Oil Co.*, 48 Fed. Supp. 937; *Sandford's Estate v. Commissioner of Internal Revenue*, 308 U. S. 39, 60 Sup. Ct. Rep. 51, 60, and *Nagle v. O'Connor*, 88 Fed. (2d), 936, 939."

The Interpretations of the Administrator Are Inconsistent

Not only have the interpretations sought to be placed upon the Regulation and Act itself by the Administrator been inconsistent with the Act and the Regulation, but, in fact, the various interpretations have been inconsistent one with another. In his Brief the Petitioner states

> "the settled administrative construction has followed the plain meaning of the Regulation."

Reference is made to a bulletin entitled, "What Every Retailer Should Know." The reference itself would appear to apply only to retailers and wholesalers and to have no application to a manufacturer such as Respondent was.

Thereafter, on August 20, 1942, the Administrator stated:

O.P.A. 564, *supra.*

"However, if after the general price increase the seller delivered to a class of purchaser only at a lower price, the lower price is the maximum price *unless the delivery was made under a contract.*" (Emphasis supplied.)

Subsequently, on December 5, 1942, by O.P.A. Press Release No. 1223, the Administrator says:

> "The effect is to allow one who last March delivered at prices established by a *contract signed many months before* and who raised his prices generally before April 1st, to bring his prices on the expiration of the contract in line with the increased prices he was *charging* in March. *March is the base period under the two Regulations.*" (Emphasis supplied.)

It should be noted that both of the quoted statements, which relate to pre-existing contracts, were made after the so-called "Interpretations" relied upon by the Petitioner.

Not only is the interpretation now contended for by the Administrator inconsistent with the interpretations issued in the foregoing press releases, but it is likewise altogether inconsistent with both the language of the *Emergency Price Control Act of 1942* and with the language of the Regulation of the Administrator issued thereunder. In Section 302 of the Emergency Price Control Act of 1942 the language is:

> "a. The term 'sale' includes sales, dispositions, exchanges, leases, and other transactions, and *contracts and offers to do any of the foregoing.* The term 'sale,' 'selling,' 'seller,' 'buy' and 'buyer' shall be construed accordingly." (Emphasis supplied.)

Substantially the same language as appears in the Act likewise appears in subdivision (r) of General Maximum Price Regulation 1499.20, quoted *supra.*

As said before in this Brief, the interpretation sought by the Administrator disregards the word *sale* and seeks to make the word *delivery* the sole criterion. If an *offer to sell* is a sale, obviously a delivery would not be required to accomplish a sale under the terms of the Act or the Regulation.

Administrator Bowles makes the contention that his interpretation of the language of the Regulation should be

controlling because issued by him and construed by him in the so-called "Interpretations" appearing in Petitioner's Brief. As a matter of fact, the language of the Regulation is the language of the Administrator's predecessor and, if the interpretations had the sanction of an Administrator, it must have been the interpretation of a former Administrator, not of Petitioner.

On the contrary, the construction placed by the Courts below upon the Regulation is consistent with the language of the Act, with the language of the Regulation, and with the last press release issued by the Administrator by way of construction.

In construing his own Regulation, the Administrator could have worded both the Regulation and the construction in any way that he pleased, and asserted, as he does, that such Regulation and construction or interpretation was binding upon the Court. *If this be true, it is difficult to ascertain what, if any, function would be left to the Courts under the Act.*

The Courts Below Did Not Invade the Jurisdiction of the Emergency Court of Appeals

In Petitioner's Brief it is contended that the Courts below, particularly the Circuit Court of Appeals, invaded the jurisdiction of the Emergency Court of Appeals. There is no merit in any such contention.

It clearly appears from the decision itself (145 F. (2d), 482-5) that the Circuit Court of Appeals recognized its lack of jurisdiction to consider the validity of the Regulation and specifically so stated in the following language:

> "The validity of this Regulation is not questioned . . ."

And:

> "Moreover, since this Court has no jurisdiction to consider the validity or invalidity of these particular

Regulations, we must accept and apply them in a manner consistent with their validity."

The Court did properly interpret the Regulation which it not only had the jurisdiction but the duty to do when the question of its interpretation was presented to it, and the power of the Court to interpret the Regulation is not only clearly recognized by the Court but has been insisted upon by the Administrator himself, as will appear from the language of the Court in the case of *Marlene Linens v. Bowles*, 144 Fed. (2d), 874, as follows:

> "The primary contention of the complainant is that the interpretation placed upon the Regulation by the Administrator's . . . office was wrong. The Administrator urges that this is the sole issue which Complainant seeks to raise and that in the absence of an attack upon the validity of the Regulation, such a question is not cognizable in this Court (U. S. Emergency Court of Appeals) he (Administrator) suggests that in an appropriate Court the Complainant may obtain a declaratory judgment as to the interpretation and applicability of the Regulation. He (Administrator) also suggests that in an enforcement proceeding against it for an alleged violation of the Regulation, the Complainant may defend on the ground that the Administrator's interpretation is erroneous and that the Regulation is inapplicable to it. We (the Court) agree that if the Complainant merely sought an interpretation of the Regulation, without in any way attacking the validity, it would not be cognizable by this Court." (Words in parenthesis added.)

It thus appears that not only has the Administrator never questioned the right and duty of a District Court or a Court of Appeals to interpret a Regulation but that he has insisted that such Courts alone have the right so to do and that the Emergency Court of Appeals is altogether without jurisdiction so to do.

The Courts below properly acted upon the assumption that the Administrator in promulgating the Regulation sought to comply with the provisions of the Act and gave to the action of the Administrator, in promulgating the Regulation, an interpretation which was consonant with the Act and with the declared purpose of the Administrator to make the month of March, 1942, the base period.

The Interpretation of the Regulation by the Courts Below Promote and Support the Stabilization Program

In Petitioner's Brief there has been injected a contention that the stabilization program may be unsettled in the event the decision of the Courts below be affirmed. In support of that contention, Petitioner has at considerable length asserted, though without support in the record, that there are forty-seven regulations similar to Price Regulation 188 affecting numerous commodities; that is to say that all of said commodities have had their ceiling price fixed and determined by using the month of March, 1942, as the base period. Such a contention is unsound and contrary to logical reasoning.

In the first place, another factual situation identical with that of the case at bar is not only most improbable, but so remote that there is practically no chance whatsoever of this decision having the slightest effect upon any of the ceiling prices heretofore established pursuant to the Act and Regulation.

Even if the decision in this case might have any effect whatsoever on the stabilization program, what will that effect be?

If the construction contended for by the Administrator should be adopted, it would serve to defeat the Administrator's declared purpose to preserve, insofar as practicable, the current price relationship existing during the base period of the month of March, 1942; and this for the reason that

if the ceiling prices are to be determined solely upon the basis of actual deliveries made pursuant to contracts entered into in October, 1941, in utter disregard of current prices prevailing during the base period of March, 1942, the result would of necessity be that the current prices of the base period of March, 1942, would be disregarded and in place thereof the ceiling prices would be fixed on the current prevailing price in the month of October, 1941. Correspondingly, although the Administrator says that a month is the maximum base period, the length of the base period would by such construction be increased to run from October, 1941, to March, 1942, both inclusive.

If, upon the contrary, the ruling of the Courts below be affirmed, the only result that can follow is that the current prevailing price during the month of March, 1942, will be *preserved* as fixing the maximum price. If any contention of the Administrator stands out in the record, it is that the month of March, 1942, and that month alone, must be the base period.

Or, in the language of the Circuit Court of Appeals in the case at bar:

> "The plain intendment of the statutes and regulations by means of which prices were frozen was to fix those prices indiscriminately at the highest price for which an article of commerce was bought and sold in legitimate trading in the due course of business during March, 1942. The Act requires that the prices established must be fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period.' "
>
> (Citing *Yakus v. U. S., supra.*)

CONCLUSION

In conclusion, it is respectfully submitted that the Courts below fully understood when they were interpreting the

Regulation involved that, insofar as this action by the Administrator is concerned, that portion of the action which involves treble damages is an action for a penalty. The compulsory payment of an arbitrary sum fixed by the Congress which is not intended to recoup a loss or damage which is personal in its nature, but, which on the other hand, is intended to punish as a deterrent, is a penalty.

Huntington v. Attrill, 146 U. S. 657, 36 L. Ed. 1123.

In fact an action under Section 205(e), *the precise Section relied upon here by petitioner*, was held by the Circuit Court of Appeals, 6th Circuit, on February 16, 1945, to be an action for a penalty.

Bowles v. Farmers National Bank of Lebanon, Ky., 147 F. 2d, 425.

Equity abhors a penalty and the Respondent is therefore entitled to the benefit of such interpretation both of the Act and of the Regulation as will avoid the penalty.

Let us see where the literal interpretation of "actual delivery" would lead us in the case at bar. Respondent was under obligation to deliver the identical material when called for at a price of $1.50 per ton throughout the entire month of March, 1942 (R. p. 31); and had for that purpose placed the material in stockpiles (R. p. 32) ear-marked as special stockpiles for the purpose of having engineering tests made for such deliveries and delivering therefrom to the purchaser (R. p. 32). These tests were made promptly by the Government Inspector and the product promptly accepted for shipment. Shipments were made both before and after March, 1942 (R. p. 32), and yet merely because there chanced to be no actual delivery, the Administrator contends that Respondent should be required to sell its product at 32c per ton below actual cost of production.

The Courts below refused to accept such an unreasonable, inequitable and strained construction of the Act and Regulation. On the contrary, the Courts below followed that cardinal rule of construction which holds that due regard should be had for the general purpose and object of the Statute and Regulation, when taken as a whole. By thus keeping in mind the general purpose and design they arrived at and announced a fair, reasonable and correct interpretation.

It is, therefore, respectfully submitted that the Judgment of the Circuit Court of Appeals should be affirmed.

ROBERT RUARK, Raleigh, N. C.
BENNETT H. PERRY, Henderson, N. C.
ROBERT H. ANDERSON, Miami, Florida
J. M. HEMPHILL, Chester, S. C.
SAMUEL W. RUARK, Raleigh, N. C.
Attorneys for Respondent.

COMMERCIAL PRINTING CO., RALEIGH, N. C.

SUPREME COURT OF THE UNITED STATES.

No. 914.—October Term, 1944.

Chester Bowles, Administrator, Office of Price Administration, Petitioner,
vs.
Seminole Rock & Sand Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 4, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

Our consideration here is directed to the proper interpretation and application of certain provisions of Maximum Price Regulation No. 188,[1] issued by the Administrator of the Office of Price Administration under Section 2(a) of the Emergency Price Control Act of 1942.[2]

Respondent is a manufacturer of crushed stone, a commodity subject to Maximum Price Regulation No. 188. In October, 1941, respondent contracted to furnish the Seaboard Air Line Railway crushed stone on demand at 60 cents per ton, to be delivered when called for by Seaboard. This stone was actually delivered to Seaboard in March, 1942.

In January, 1942, respondent had contracted to sell crushed stone to V. P. Loftis Co., a government contractor engaged in the construction of a government dam, for $1.50 a ton.[3] This stone was to be delivered by respondent by barge when needed at the dam site. A small portion of stone of a different grade than that sold to Seaboard was delivered to Loftis Co. during January pursuant to this contract. For some time thereafter, however, Loftis Co. was unable to pour concrete or to store crushed stone at the dam site. Respondent thus made no further deliveries under this contract until August, 1942, at which time stone of the same grade as received by Seaboard was delivered to Loftis Co. at the $1.50 rate.

---

[1] 7 Fed. Reg. 5872, 7967, 8943.

[2] 56 Stat. 23, 24.

[3] The contract actually spoke in terms of $1.50 per cubic yard, but there is no appreciable difference between a cubic yard of crushed stone and a ton of crushed stone.

Subsequently, and after the effective date of Maximum Price Regulation No. 188, respondent made new contracts to sell crushed stone to Seaboard at 85 cents and $1.00 per ton. Alleging that the highest price at which respondent could lawfully sell crushed stone of the kind sold to Seaboard was 60 cents a ton, since that was asserted to be the highest price charged by respondent during the crucial month of March, 1942, the Administrator of the Office of Price Administration brought this action to enjoin respondent from violating the Act and Maximum Price Regulation No. 188.[4] The District Court dismissed the action on the ground that $1.50 a ton was the highest price charged by respondent during March, 1942, and that this ceiling price had not been exceeded. The Fifth Circuit Court of Appeals affirmed the judgment. 145 F. 2d 482. We granted certiorari because of the importance of the problem in the administration of the emergency price control and stabilization laws.

In his efforts to combat war time inflation, the Administrator originally adopted a policy of piecemeal price control, only certain specified articles being subject to price regulation. On April 28, 1942, however, he issued the General Maximum Price Regulation.[5] This brought the entire economy of the nation under price control with certain minor exceptions. The core of the regulation was the requirement that each seller shall charge no more than the prices which he charged during the selected base period of March 1 to 31, 1942. While still applying this general price "freeze" as of March, 1942, numerous specialized regulations relating to particular groups of commodities subsequently have made certain refinements and modifications of the general regulation. Maximum Price Regulation No. 188, covering specified building materials and consumers' goods, is of this number.

[4] The Administrator also sought to recover from respondent a judgment under Section 205(e) of the Act for three times the amount by which the sales price of the crushed stone sold by the respondent to Seaboard after the effective date of Maximum Price Regulation No. 188 exceeded 60 cents per ton. The District Court held that the purchaser rather than the Administrator was vested with whatever cause of action existed to recover a judgment under Section 205(e). The Circuit Court of Appeals, however, held that Section 205(e), as amended by Section 108(b) of the Stabilization Extension Act of 1944, 58 Stat. 640, entitled the Administrator rather than the purchaser to bring suit under the circumstances of this case. This aspect of the case is not now before us.

[5] 7 Fed. Reg. 3156.

The problem in this case is to determine the highest price respondent charged for crushed stone during March, 1942, within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. The legality of the result reached by this process, of course, is quite a different matter. In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.

Section 1499.153(a) of Maximum Price Regulation No. 188 provides that "the maximum price for any article which was delivered or offered for delivery in March, 1942, by the manufacturer, shall be the highest price charged by the manufacturer during March, 1942 (as defined in § 1499.163) for the article." Section 1499.163(a)(2)[6] in turn provides that for purposes of this regulation the term:

"'Highest price charged during March, 1942' means

"(i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942; or

"(ii) If the seller made no such delivery during March, 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or

"(iii) If the seller made no such delivery and had no such offering price to a purchaser of the same class during March, 1942, the highest price charged by the seller during March, 1942, to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers; . . ."

It is thus evident that the regulation establishes three mutually exclusive rules for determining the highest price charged by a seller during March, 1942. The facts of each case must first be tested by rule (i); only if that rule is inapplicable may rule (ii)

[6] 7 Fed. Reg. 7968-7969.

be utilized; and only if both rules (i) and (ii) are inapplicable is rule (iii) controlling.

The dispute in this instance centers about the meaning and applicability of rule (i). The Administrator claims that the rule is satisfied and therefore is controlling whenever there has been an actual delivery of articles in the month of March, 1942, such as occurred when respondent delivered the crushed rock to Seaboard at the 60-cent rate. The respondent, on the other hand, argues that there must be both a charge and a delivery during March, 1942, in order to fix the ceiling price according to rule (i) Since the charge or sale to Seaboard occurred several months prior to March, it is asserted that rule (i) becomes inapplicable and that rule (ii) must be used. Inasmuch as there was an outstanding offering price of $1.50 per ton for delivery of crushed stone to Loftis Co. during the month of March, 1942, although the stone was not actually delivered at that time, respondent concludes that the requirements of rule (ii) have been met and that the ceiling price is $1.50 per ton.

As we read the regulation, however, rule (i) clearly applies to the facts of this case, making 60 cents per ton the ceiling price for respondent's crushed stone. The regulation recognizes the fact that more than one meaning may be attached to the phrase "highest price charged during March, 1942." The phrase might be construed to mean only the actual charges or sales made during March, regardless of the delivery dates. Or it might refer only to the charges made for actual delivery in March. Whatever may be the variety of meanings, however, rule (i) adopts the highest price which the seller "charged . . . for delivery" of an article during March, 1942. The essential element bringing the rule into operation is thus the fact of delivery during March. If delivery occurs during that period the highest price charged for such delivery becomes the ceiling price. Nothing is said concerning the time when the charge or sale[7] giving rise to the

[7] Respondent points to the provision in Section 302(a) of the Act, 56 Stat. 36, to the effect that the term "sale" as used in the Act includes "sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing," as well as to a similar provision in Section 1499.20(z) of the General Maximum Price Regulation. But such a definition is of no assistance in determining the meaning of the Administrator's use of the phrase "charged . . . for delivery" during March, 1942.

delivery occurs. One may make a sale or charge in October relative to an article which is actually delivered in March and still be said to have "charged . . . for delivery . . . during March." We can only conclude, therefore, that for purposes of rule (i) the highest price charged for an article delivered during March, 1942, is the seller's ceiling price regardless of the time when the sale or charge was made.

This conclusion is further borne out by the fact that rule (ii) becomes applicable only where "the seller made no such delivery during March, 1942," as contemplated by rule (i). The absence of a delivery, rather than the absence of both a charge and a delivery during March, is necessary to make rule (i) ineffective, thereby indicating that the factor of delivery is the essence of rule (i). It is apparent, moreover, that the delivery must be an actual instead of a constructive one. Section 1499.20(d) of General Maximum Price Regulation, incorporated by reference into Maximum Price Regulation No. 188 by Section 1499.151, defines the word "delivered" as meaning "received by the purchaser or by any carrier . . . for shipment to the purchaser" during March, 1942. Thus an article is not "delivered" to a purchaser during March because of the existence of an executory contract under which no shipments are actually made to him during that month. In short, the Administrator in rule (i) was concerned with what actually was delivered, not with what might have been delivered.

Any doubts concerning this interpretation of rule (i) are removed by reference to the administrative construction of this method of computing the ceiling price. Thus in a bulletin issued by the Administrator concurrently with the General Maximum Price Regulation entitled "What Every Retailer Should Know About the General Maximum Price Regulation,"[8] which was made available to manufacturers as well as to wholesalers and retailers, the Administrator stated (p. 3): "The highest price charged during March 1942 means the highest price which the retailer charged for an article *actually delivered* during that month or, if he did not make any delivery of that article during March,

[8] General Maximum Price Regulation, Bulletin No. 2 (May, 1942). Maximum Price Regulation No. 188 established prices "at the identical level of the General Maximum Price Regulation" for articles dealt in during March, 1942. 7 Fed. Reg. 5873.

then his *highest offering price* for delivery of that article during March." He also stated (p. 4) that "It should be carefully noted that *actual delivery* during March, rather than the making of a sale during March, is controlling." In his First Quarterly Report to Congress, the Administrator further remarked (p. 40) that " 'Highest price charged' means one of two things: (1) It means the top price for which an article was delivered during March 1942, in completion of a sale to a purchaser of the same class . . . (2) If there was no actual delivery of a particular article during March, the seller may establish as his maximum price the highest price at which he offered the article for sale during that month." Finally, the Administrator has stated that this position has uniformly been taken by the Office of Price Administration in the countless explanations and interpretations given to inquirers affected by this type of maximum price determination.

Our reading of the language of Section 1499.163(a)(2) of Maximum Price Regulation No. 188 and the consistent administrative interpretation[9] of the phrase "highest price charged during March, 1942" thus compel the conclusion that respondent's highest price charged during March for crushed stone was 90 cents per ton, since that was the highest price charged for stone actually delivered during that month. The two courts below erred in their interpretation of this regulation and the judgment below must accordingly be reversed.

---

[9] Respondent points to two allegedly inconsistent interpretations made by the Administrator:

1. On August 20, 1942 (O. P. A. Press Release No. 564), he made certain statements with reference to Amendment 23 to the General Maximum Price Regulation, 7 Fed. Reg. 6615, allowing a different method of maximum price computation where general price increases were announced prior to April 1, 1942, and deliveries at lower prices were made in March under previous contracts. The provisions and applicability of this amendment are not in issue in this case and statements interpreting that amendment have no bearing here.

2. On December 5, 1942 (O. P. A. Press Release No. 1223), he issued a statement interpreting Amendment 38 to the General Maximum Price Regulation and Amendment 3 to Maximum Price Regulation No. 188, 7 Fed. Reg. 10155. These amendments authorized sellers who made general price increases prior to April 1, 1942, to apply the increases to ceiling prices for goods and services delivered during March under long-term contracts. The Administrator's explanation of these amendments, which are not presently before us, is likewise irrelevant in this case.

Indeed, the fact that the Administrator found it necessary to make such amendments is some evidence that under the rules here in issue the price established under a previous contract is the maximum price if that was the highest price for goods actually delivered during March, 1942.

We do not, of course, reach any question here as to the constitutionality or statutory validity of the regulation as we have construed it, matters that must in the first instance be presented to the Emergency Court of Appeals. *Lockerty* v. *Phillips*, 319 U. S. 182; *Yakus* v. *United States*, 321 U. S. 414, 427-431. Nor are we here concerned with any possible hardship that the enforcement of the 60-cent price ceiling may impose on respondent. Adequate avenues for relief from hardship are open to respondent through the provisions of Section 2(c) of the Act and Section 1499.161 of the regulation.

Reversed.

Mr. Justice ROBERTS thinks the judgment should be affirmed for the reasons given in the opinion of the Circuit Court of Appeals, 145 F. 2d 482.